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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PRYOR et al., Defendants and Appellants.	B278881 (Los Angeles County Super. Ct. No. MA066967)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, reversed in part, and remanded.

Werksman Jackson Hathaway & Quinn, Kelly C. Quinn, and Mark W. Allen, for Defendant and Appellant Michael Pryor.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant Richard Teer.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell, Scott A. Taryle, and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Michael Pryor and Richard Teer each appeal from their judgment of conviction of home invasion robbery in concert (Pen. Code,[1] §§ 211, 213, subd. (a)(1)(A)), mayhem (§ 203), and torture (§ 206), with true findings on gang enhancements (§ 186.22, subd. (b)), great bodily injury enhancements (§ 12022.7, subd. (a)), and firearm enhancements (§ 12022.53, subd. (b)). On appeal, Pryor and Teer join in arguing that (1) the trial court erred in instructing the jury on uncharged conspiracy; (2) the trial court erred in ruling on the admissibility of certain evidence; (3) the evidence was insufficient to support the gang enhancement findings; (4) the evidence was insufficient to support the robbery convictions and the acting-in-concert findings; and (5) the prosecutor committed prejudicial misconduct by misstating the law and vouching for witnesses. We reverse each appellant's robbery conviction in count 1, and remand for resentencing. In all other respects, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In a third amended information, the Los Angeles County District Attorney charged Pryor and Teer with two counts of home invasion robbery while acting in concert with two or more other persons (§§ 211, 213, subd. (a)(1)(A)) (counts 1, 4), one count of attempted, willful, deliberate, and premediated murder (§§ 664, 187, subd. (a)) (count 3), one count of mayhem (§ 203) (count 5), and one count of torture (§ 206) [count 6]. Pryor also was charged with one count of possession of a firearm by a felon

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

(§ 29800, subd. (a)(1)) (count 2). As to counts 1 and 3 through 6, it was alleged that Pryor and Teer committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)), and that Pryor personally used a firearm during the commission of the offenses (§ 12022.53, subd. (b)). As to counts 3, 4, and 6, it further was alleged that Pryor and Teer personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). It also was alleged that Teer had a prior serious or violent felony conviction within the meaning of section 667, subdivision (a)(1) and/or the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12). Pryor and Teer each pleaded not guilty to the charges and denied the enhancement allegations.

II. The Prosecution Evidence

A. Appellants' Prior Contacts with Charles Moore

The charges in this case arose out of a violent beating of Charles Moore by a group of men that included Teer, Pryor, Jaime Jenkins, and Keith White.[2] Prior to the attack, Moore had been an acquaintance of all four men. Moore, Teer, Pryor, and Jenkins were members of various white supremacist "skinhead" gangs in Antelope Valley, California. Moore joined the Antelope Valley Skins (AV Skins) in 1999, but claimed to have left the gang in 2013. Moore knew Teer to be a member of the Answer Skins gang and a prior member of the AV Skins. Moore knew

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[2] White testified at trial pursuant to a leniency agreement in which he pleaded guilty to attempted murder and robbery and was sentenced to 13 years in prison in exchange for his truthful testimony.

Pryor to be a member of multiple skinhead gangs, including the American Front, Satanic Skins, and Answer Skins. Teer was known as "Peck," and Pryor was known as "Kid." Moore also knew Jenkins to be an AV Skins member. Moore had socialized with White in the past and had known White's family for many years. White's two brothers were former members of skinhead gangs, but White did not belong to any gang.

In early September 2015, a few weeks before the attack, Lurana Schmerber, Moore's friend and Teer's girlfriend, asked Moore to accompany her to a home so that she could vandalize Teer's car. Moore agreed to drive with Schmerber because he did not want her to go alone. While Moore waited in the car, Schmerber slashed the tires on Teer's car with a knife. Moore noticed Teer looking out the window of the home as Schmerber vandalized his car. Later that night, Teer called Moore and asked Moore if he had slashed his tires. Moore denied doing so. Teer wanted to meet with Moore that same night, but Moore refused. On another occasion, Teer called Moore and told him that they needed to meet. Moore continued to avoid Teer because he was afraid for his safety.

About a week before the attack, Moore was at a gas station when Pryor pulled up in his car. Pryor told Moore that he was on the phone with Teer, and that Teer was on his way to meet with Moore. Moore got in his car and drove away. Pryor then followed Moore in his own car. At one point, Moore passed a blue car that he did not recognize. After the blue car and Pryor's car turned onto another street, Moore heard the sound of gunfire. Moore did not know the source of the gunfire, but he feared that someone might be shooting at him.

A few days later, Pryor told White and Jenkins about the incident with Moore. Pryor recounted that he was chasing Moore in his car when he drove by a third vehicle that began firing at him. Pryor believed that a Hispanic gang member was in the third vehicle, and that Moore had arranged for that person to shoot at Pryor's car. Pryor was able to get away by driving in a different direction. Pryor showed White and Jenkins a number of bullet holes in his car. Later that day, Jenkins told White that the conflict had begun with a tire slashing. When White asked Jenkins why he wanted to be involved, Jenkins responded that "it was his comrades" and he had to help. According to White, "comrade" was a term that skinheads called one another.

B. Appellants' Beating of Moore and Robbery of Moore and James Carter

On the morning of September 15, 2015, Moore was at a house in Lancaster, California with his friend, James Carter. The house was owned by Tony Zullo. Zullo had asked Carter to come to the house the previous day to repair some surveillance cameras, and Carter in turn had invited Moore to the house to hang out with him. Early that morning, Zullo was asleep in his bedroom. Zullo's guest, Travis Sanford, and Sanford's girlfriend, Candy, were also inside the house. Moore, Carter, and a woman named Kristy Langosh were in the garage. Langosh was asleep on one couch while Moore and Carter were asleep on another couch.

That same morning, White and Jenkins went to Teer's house to meet with Teer and Pryor. Teer, Pryor, and Jenkins were still upset that Moore had helped Teer's girlfriend slash his tires, and that Pryor had been shot at while chasing Moore. The men discussed a plan to beat up Moore, but they first needed to

find him. Jenkins made a few calls to try to ascertain Moore's whereabouts. At some point, Teer told the group that he had located Moore. Teer said that he had talked to the owner of the house where Moore was sleeping, and that the owner would let them in. When someone in the group raised a concern that Moore might be armed, Teer responded that he had a gun. The men began searching for the gun in Teer's house, and Pryor eventually found it. Teer made a comment insinuating he was going to shoot Moore, but White could not tell if he was serious.

The group then drove in three cars to Zullo's house. Teer and White each drove their own cars, while Pryor and Jenkins went together in Pryor's car. Teer, Pryor, and Jenkins arrived first and went inside together. White followed a short time later. As White approached the house, he passed by Sanford, who was exiting the front door. Sanford directed White to the inside of the house and told him to go down the hallway. Once inside, White disabled a surveillance camera that was located in the hallway. White then went toward the garage where Teer, Pryor, and Jenkins had gone to confront Moore.

Carter and Langosh were asleep on the couches when they were awakened by a group of men entering the garage. One man was holding a crow bar or tire iron, and another was holding a gun. When Carter stood up, the man with the gun pointed his weapon at Carter. He ordered Carter to sit back down, cover his head, and "keep [his] fuckin' head down." Langosh also heard someone say, "Cover your head back up and keep it covered or I'm going to fucking shoot you." Both Carter and Langosh complied with the orders, and stayed on the couches with their heads covered.

Teer, Pryor, and Jenkins then surrounded Moore on the couch. Moore was awakened by someone yelling, "Where is that mother fucker at?" When Moore opened his eyes, he saw Pryor pointing a gun at his face. Moore first was struck with a crow bar on his left side. He did not see who was holding the crow bar at the time, but the blow came from the direction where Teer was standing. Moore was then struck repeatedly with a gun on the right side of his head. When Moore tried to stand up, Pryor jumped on his back and put him in a headlock. As Pryor pressed against Moore's neck, Teer put his fingers in Moore's mouth and tried to rip off his upper lip. Moore fell back onto the couch. Once Pryor let go, Moore was able to stand back up. Jenkins then jumped on Moore, put him in a headlock, and began punching him in the face. As the men repeatedly hit and kicked Moore, he felt his wallet being pulled from the pocket of his shorts.

At some point, Moore fell to his knees in a daze. Pryor then pointed the gun at Moore and said, "I'm just going to put one in." Moore heard one of the other men yell out, "Don't do it. The neighbors have heard enough. It will be too loud." While she was covered with a blanket, Langosh also heard someone say, "We ought to just fucking kill him." She then heard another man respond, "We can't do that. If we do that, we have to kill them all." Near the end of the assault, Moore again was struck with the gun on the top of his head. One of the men also warned Moore to "keep the word skinhead out of [his] mouth." All four men then left the garage.[3]

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[3] None of the witnesses saw White during the attack. At trial, White testified that he was present in the garage, but remained standing in the doorway and never touched Moore.

As the men were walking out of the house, Jenkins passed by White and handed him a bag. White took the bag and placed it in the passenger seat of his car. White also heard Pryor say that he was going to "fuck up" Moore's truck, which was parked in front of the house. As White was driving away in his car, he saw Jenkins walking on the side of the road. Jenkins lifted his shirt and showed White a gun tucked in his waistband. White and Jenkins later met at Jenkins's house. Jenkins opened the bag, which contained two cell phones. White kept one of the cell phones and later destroyed it. The other cell phone stayed with Jenkins.

Immediately after the attack, Moore stumbled into Zullo's house. He was bleeding profusely from his head and was having difficulty breathing. While Carter and Langosh tried to tend to Moore's injuries, Zullo dialed 911. Moore was transported to the hospital; he suffered injuries to his head, neck, and face from the beating.

After the assault ended, Carter noticed that his black tote bag had been moved, and that someone had rummaged through the bag and removed some of the contents. Carter's wallet and his cell phone were also missing. Both items had been in Carter's possession before the men entered the garage and were gone when the men left. Carter's wallet and cell phone were never recovered. Prior to the attack, Moore had a pocketknife on his

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According to White, Teer initially held the gun while Pryor and Jenkins repeatedly hit Moore with their fists. Pryor then took the gun from Teer and began pounding the top of Moore's head with the gun. Jenkins told Moore that he did not want to ever hear him claim skinheads again. Pryor then delivered one final blow to Moore's head with his fist.

person. He also had placed a larger knife in a sheath between the cushions of the couch for safekeeping. After the attack, both of Moore's knives were missing; the empty sheath was found on the floor of the garage. Neither of Moore's knives was ever recovered.

When officers arrived on the scene, they observed that Moore's vehicle had a crack in the front windshield, and that the driver's side window had been smashed. Later that day, Jenkins was detained by the police while he was driving Pryor's car. During a search of Pryor's car, the police recovered a tire iron. The police later reviewed surveillance video from a residence across the street from Zullo's house. The video showed the cars belonging to Pryor, Teer, and White driving by Zullo's house on the morning of the attack. It also showed Pryor, Teer, and Jenkins walking toward the house shortly before the attack, followed by White.

C. The Gang Officer Testimony

On August 26, 2015, a few weeks before the assault on Moore, Los Angeles County Sheriff's Detective Christopher Keeling encountered Pryor at an Antelope County fair. Pryor was wearing a red shirt with the words "White Power" written on the front. Pryor told Detective Keeling that he was an American Front gang member, and that he was not a member of the AV Skins. Pryor also said that he did not like how the AV Skins were representing the skinhead movement, and that he was there "to set the record straight." Following that conversation, Detective Keeling prepared a field interview card documenting his contact with Pryor and identifying Pryor as an American Front gang member.

Los Angeles County Deputy Sheriff David Welle testified as the prosecution's gang expert. Since 2010, Officer Welle has been assigned to the Lancaster Station's gang unit where he is responsible for investigating gang crimes. As described by Officer Welle, gangs often have a hierarchy comprised of original gangsters, shot callers, and street soldiers. While original gangsters have the most seniority, shot callers instruct the street soldiers on what to do. Respect, money, and power are the three most important motivators for a gang. When a gang successfully commits a crime, it gains respect by enhancing its reputation and creating fear and intimidation in the community. Respect between members of the same gang is also important. If a gang member disrespects a fellow member, the gang will "regulate" the offender for allowing a loss of respect within the gang.

According to Officer Welle, the white supremacist movement as a whole is extremely well-organized with websites, books, newspapers, and other means by which individuals share ways to carry out their agenda. The skinhead movement is part of the overall white supremacist movement. Skinheads associate themselves closely with Norse mythology, Nazi symbology, and the Runic alphabet, and often use the color red to signify their Aryan bloodline. They also use the numbers "88" and "14" as common symbols. The number "88" refers to "Heil Hitler" and "The 88 Precepts" by David Lane, who is a member of a militant white supremacist organization. The number "14" refers to "14 Words," a manifesto by David Lane about "securing the existence of a future for white children."

The largest skinhead gang in the Antelope Valley is the Antelope Valley Skins, or AV Skins. The gang has been in existence since the early 1990s, and currently has 70 to 75

members. There are other smaller white supremacist gangs in the area that "typically operate with the AV Skins . . . because they don't have the same numbers as some of the other local gangs." These smaller gangs include the Answer Skins, American Front, Metal Mindz, Dead Line Family Skins, and Palmdale Peckerwoods.

All of these Antelope Valley skinhead gangs, including the AV Skins, share a common ideology of white supremacy and a common goal of "striving to attain a perfect Ar[y]an world." They also share common signs and symbols. Because the Antelope Valley is not a traditional gang area, these gangs "tend to join together to increase their . . . power base." Most of the crimes committed by the smaller gangs are done in concert with the larger AV Skins, and it is "easy for them to work together" because they share common goals. The gangs strategize both formally and informally to carry out their crimes, and they show loyalty to one another as part of the overarching Antelope Valley skinhead movement. As Officer Welle explained: "They do what they can to not operate against one another. . . . And it's only in cases similar to what we have here where there is some sore of stri[f]e between members where things can go awry. They have an end goal that includes eliminating or at least ostracizing and getting rid of a large portion of society. They don't necessarily want to make enemies or eliminate their own power so they will always, in my opinion, try and work together.

Officer Welle testified that crimes "typically" committed by the AV Skins include narcotics possession, weapons possession, assaults, robberies, and burglaries. The gang's "primary crimes" are burglary, auto theft, narcotics sales, and felony assaults. These crimes are committed "individually and collectively" by the

AV Skins "and any subsets or clicks that operate with them." On February 16, 2012, Robert Michael Ball, an AV Skins member and a Metal Mindz member, committed an assault by force likely to produce great bodily injury. On April 28, 2012, Justin Sumnicht, an AV Skins member, also committed an assault by force likely to produce great bodily injury and made a criminal threat.

Officer Welle opined that Teer had dual membership in the AV Skins and the Answer Skins, and was a shot caller within the gangs. Teer had been validated as an AV Skin by the California Department of Corrections and Rehabilitation. He was a founding member of the Answer Skins, a California prison gang with about nine members. Teer's gang moniker was "Peck." He had a number of tattoos associated with white supremacy, the Antelope Valley, and the Answer Skins. These tattoos included the initials "A.N.S." for Answer Skins written in red; the word "Patience" written in the Runic alphabet; the words "White Power," "Answer Skin," and "Seigheil"; the number "88"; and images of a swastika, iron cross, and Nazi war eagle. During a search of Teer's home, the police found a letter addressed to Teer in which the author referred to himself as a "comrade" and to Teer as a "skinhead." Other items found in Teer's home included photographs of Teer performing a Nazi salute and making an "A.V." sign with his hand; a picture depicting Adolf Hitler with a swastika and other Nazi symbols; and a copy of David Lane's white genocide manifesto.

Officer Welle testified that Pryor was a documented member of the American Front Skins, a skinhead gang that was formed in the late 1980s. Based on the facts in this case, Officer Welle opined that Pryor also was a member of the AV Skins.

Pryor had a number of tattoos associated with the skinhead movement, including a swastika and the words "Fuck Your Race" and "White Trash." Pryor also had an emblem on the back of his car with the numbers "1488." Officer Welle opined that Jenkins was a member of the AV Skins with the moniker "Little Pit," and that White, while not a gang member, had close ties to white supremacist groups in the area. Officer Welle believed that the victim, Moore, was a member of a skinhead gang at the time of the beating, but had ceased being a member due to the crimes committed against him.

When presented with a hypothetical based on the facts in this case, Officer Welle opined that the crimes would have been committed for the benefit of, at the direction of, or in association with a criminal street gang and with the specific intent to promote, further, or assist in criminal conduct by gang members. Officer Welle testified that the crimes would have been committed at the direction of and in association with a gang because a shot caller in the gang gathered a group of people at his house and then took them on a mission to discipline one of their members who had been disrespecting them. Officer Welle also testified that the crimes would have benefited the gang because the gang's act of enforcing a code of conduct among its own members would keep the gang's membership in line and remind them that they cannot disrespect their fellow members. It also would tend to enhance the reputation of the gang on the street and show rival gangs as well as community residents that disrespect toward the gang would not be tolerated. Officer Welle explained: "In those instances, people treat the gang differently. They are not going to approach them like they are punks. They are going to realize this is a gang who's aggressively enforcing

respect issues and they don't want to be trifled with and they are handling themselves in a violent fashion with people who do show them disrespect. It allows them to get away with committing other crimes. It makes people less likely to go to the police for assistance. [I]t [e]ssentially makes people more of a target for the gang."

III. Defense Evidence

Teer testified on his own behalf. Teer admitted that he was the founder and a former member of the Answer Skins, but stated that he was no longer affiliated with any skinhead gang. Teer's current profession was drug dealing. On the morning of September 15, 2015, Teer went to a house in Lancaster with Pryor, Jenkins, and White. Pryor had told Teer that Travis Sanford and the owner of the house where Sanford lived were looking for a new drug dealer, and that Pryor would introduce Teer to them. Pryor also mentioned that Moore might be at the house later that day. When Teer and the other men arrived at the house, Sanford led them inside so that they could complete a drug transaction. While Teer was setting up his scale inside the house, Pryor, Jenkins, and White went to the garage. Upon hearing a commotion, Teer walked to the garage, turned on the light, and saw White and Jenkins repeatedly beating Moore with their fists. Teer did not realize Moore was at the house until he walked in on the assault. Throughout the assault, Teer stood by the doorway of the garage while Pryor stood by the pool table several feet from Moore. Teer was concerned the police would be called so he told the men they needed to leave. The group then left the house. Teer denied that he ever touched Moore, or saw any weapons being used during the assault.

On cross-examination, Teer acknowledged that he was interviewed by the police following his arrest. During those interviews, Teer stated that, after Pryor learned of Moore's whereabouts from Sanford, they planned to "touch him up" and bring him to Teer's house where there would be "less witnesses." Teer also told the police that Sanford let the group inside the house and then left with his girlfriend. Teer claimed that, during the assault on Moore, Teer stood in the doorway of the garage while White stood near the front door of the house. As Teer watched, Pryor and Jenkins beat Moore with their fists and possibly a tire iron. Pryor also brought a gun to the house, and told Moore during the assault to keep the word "skinhead" out of his mouth. As the group was leaving the house after the assault, Pryor smashed the windows on Moore's car.

Pryor also testified on his own behalf. He admitted that he sold drugs, but denied being a member of any white supremacist gang. Pryor stated that Teer was his drug supplier and Sanford was one of his clients. Prior to the assault on Moore, Pryor had an encounter with Moore at a gas station. Pryor was aware at that time that Teer wanted to meet with Moore about the tire-slashing incident. When Moore refused to speak with Teer, Pryor followed Moore in his car. During the chase, a person in a third car fired multiple shots at Pryor's car. Pryor believed that Moore was responsible for the shooting and had called the person in the third car to assist him. On the day of the assault, Pryor went to Zullo's house with Teer, Jenkins, and White so that he could introduce Teer to Sanford. Pryor had decided to stop selling drugs and wanted to turn his clients over to Teer. Pryor did not know Moore was going to be at Zullo's house that day, and did not touch Moore during the incident. Instead, Jenkins and White

were the ones who assaulted Moore while Pryor stood by the pool table. When the group left the garage, White handed a crow bar to Pryor. At one of the men's urging, Pryor smashed Moore's car windows with the crow bar. Pryor then left the crow bar in his own car. Pryor denied that he ever had a gun with him during the assault on Moore.

On cross-examination, Pryor acknowledged that he told a different version of events to the police. In his interviews with the police, Pryor stated that he went to Zullo's house with Teer, White, and another man named Miseray. While the rest of the group went into the garage, Pryor stayed inside the house and did not witness the assault on Moore. Pryor added that he only "stuck around just to make sure he didn't fucken kill him." When asked who had a gun, Pryor replied that he did not know, but admitted his prints would be "on that gun though, because when we were at [Teer's] house, I was fondling the fucken thing. Pryor also told the police that he was a gang "dropout," but "went and played the role with [a comrade]."

The defense also called Dr. Joseph Terrazzino, a physician who specialized in internal medicine and had reviewed Moore's hospital records from the day of the assault. Dr. Terrazinno noted that Moore was treated for a fractured nose and lacerations to his head and face, and was released from the hospital the same day. Dr. Terrazinno opined that none of the injuries that Moore sustained were serious in nature.

IV. Verdict and Sentencing

At the conclusion of the trial, the jury found both Pryor and Teer guilty of the first degree robbery of Carter, the first degree robbery of Moore, mayhem, and torture with true findings on the acting-in-concert, great-bodily-injury, and gang enhancements

alleged as to those counts. The jury also found Pryor guilty of possession of a firearm by a felon, and found the personal use of a firearm enhancements alleged against Pryor to be true. The jury found both Pryor and Teer not guilty of attempted murder. The trial court sentenced Pryor to a state prison term of 53 years to life, and sentenced Teer to a state prison term of 73 years to life. Both Pryor and Teer appealed.

DISCUSSION

I. Alleged Instructional Error

The trial court instructed the jury on uncharged conspiracy as a theory of liability for the crimes committed against Moore. On appeal, Appellants contend that the trial court erred in instructing the jury with CALJIC No. 6.10.5 without giving the unanimity instruction in CALJIC No. 6.25. Appellants also claim that the trial court should have used CALCRIM No. 416 instead because that instruction required the jury to unanimously agree which particular crime Appellants conspired to commit.

A. Relevant Instructions

The trial court instructed the jury on uncharged conspiracy as a theory of liability with CALJIC Nos. 6.10.5, 6.11, 6.12, 6.13, 6.16, 6.17, 6.18, 6.20, 6.21, and 6.24. As given by the trial court, CALJIC No. 6.10.5 (Conspiracy and Overt Act–Defined–Not Pleaded as a Crime Charged) provided, in relevant part: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of battery in violation of Penal Code section 242 or kidnapping in violation of Penal Code 207(a), and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the

object of the agreement. Conspiracy is a crime, but is not charged as such in this case. [¶] In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed.

CALJIC No. 6.11 (Conspiracy–Joint Responsibility) instructed the jury, in pertinent part: "A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though that crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of that crime or act. [¶] You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged in Counts 3-6 was perpetrated by co-conspirators in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy."

The trial court did not instruct the jury with CALJIC No. 6.25 (Direction for Finding Objects of Conspiracy), which states, in relevant part: "In order to find the defendants guilty of the crime of conspiracy, you must find beyond a reasonable doubt that the defendants conspired to commit one or more of the crimes, and you also must unanimously agree as to which particular crime or crimes they conspired to commit." Nor did the

trial court provide any other unanimity instruction on conspiracy. At trial, defense counsel did not raise any objection to the CALJIC instructions given by the trial court.

A. Relevant Law

In a criminal case, a jury verdict must be unanimous. (Cal. Const., art. 1, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*). The jury also "must agree unanimously the defendant is guilty of a *specific* crime." (*Russo*, *supra*, at p. 1132.) "As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) Even absent a request, the trial court should give a unanimity instruction "'where the circumstances of the case so dictate.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; see also *People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.)

As the California Supreme Court explained in *Russo*, "[t]his requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Russo*, *supra*, 25 Cal.4th at p. 1132.) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the "theory" whereby the defendant is guilty." (*Ibid.*) Hence, "the unanimity instruction is

appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id*. at p. 1135.)

B. The Trial Court Did Not Err in Failing To Give a Unanimity Instruction on Uncharged Conspiracy

Appellants assert the trial court erred in failing to instruct the jury that it had to unanimously agree on which crime or crimes they conspired to commit. They argue that a unanimity instruction should have been given because the prosecution presented evidence of two discrete uncharged conspiracies (conspiracy to commit battery and conspiracy to commit kidnapping), and the jury may not have agreed which particular crime was the object of Appellants' conspiracy. We conclude that a unanimity instruction was not required in this case.

In *People v. Hajek and Vo* (2014) 58 Cal.4th 1144 (*Hajek and Vo*), overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, the California Supreme Court rejected the same argument that Appellants raise here. The defendants in *Hajek and Vo* were charged with murder. They were not charged with the substantive offense of conspiracy, but the prosecution used conspiracy as a theory of derivative liability. (*Id*. at

p. 1200.) On appeal, the defendants contended that the trial court was required to give the unanimity instruction in CALJIC 6.25 because CALJIC 6.10.5, as given by the trial court, identified two target crimes as the potential object of the conspiracy. (*Id*., at p. 1220.) In concluding that the trial court did not err in failing to give the unanimity instruction, the Supreme Court stated: "CALJIC No. 6.25 . . . is appropriate only where 'it is charged that defendant conspired to commit two or more felonies and the commission of such felonies constitute but one offense of conspiracy. (Use Note to CALJIC No. 6.25 (5th ed. 1988) p. 252.) The substantive offense of conspiracy was not charged here. Conspiracy was merely one theory of liability for murder. Under such circumstances, the jury must unanimously agree that the defendant is guilty of murder, but 'it need not decide unanimously by which theory he is guilty. [Citation.] "The key to deciding whether to give the unanimity instruction lies in considering its purpose. . . . [T]he unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events," but not "where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event."' [Citation.] Accordingly, CALJIC No. 6.25 was not required in this case." (*Id*. at p. 1221.)

In *People v. Valdez* (2012) 55 Cal.4th 82 (*Valdez*), the Supreme Court similarly held that a unanimity instruction is not required where conspiracy is merely a theory of liability and not a substantive charged offense. The defendant in *Valdez* argued that the trial court erred in failing to instruct the jury that, to convict the defendant of murder based on a conspiracy, the jury had to unanimously agree as to the existence of a conspiracy and the specific crimes the defendant conspired to commit. (*Id*. at

p. 153.) In rejecting this claim, the *Valdez* court reasoned: "'[I]t is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, [the jurors] need not decide unanimously by which theory he is guilty. [Citations.]' [Citation.] 'Not only is there no unanimity requirement as to the theory of guilt, *the individual jurors themselves need not choose among the theories*, so long as each is convinced of guilt.' [Citation.]" (*Id*. at p. 153.) Because "conspiracy functioned not as a separate crime, but as an alternative theory of liability for the charged, substantive crime of murder," the *Valdez* court concluded that the trial court had no sua sponte duty to give a unanimity instruction on uncharged conspiracy. (*Id*. at p. 154; see also *People v. Williams* (2015) 61 Cal.4th 1244, 1270 ["Where the crime of conspiracy is charged, the factual question of whether there was a single conspiracy or multiple conspiracies raises questions of jury unanimity and whether the evidence will sustain single or multiple convictions. . . . Where, however, conspiracy is a theory of liability and not a charged offense, these considerations do not arise."].)

As in *Hajek and Vo* and *Valdez*, the substantive offense of conspiracy was not charged in this case. Rather, conspiracy was merely one theory of liability for the charged offenses of robbery, mayhem, and torture committed against Moore. While the jury was required to unanimously agree that each defendant was guilty of these charged crimes, it did not need to unanimously decide by which theory each defendant was guilty. Moreover, contrary to Appellants' claim, the prosecution did not present evidence of two distinct conspiracies. The prosecution's theory was that Appellants conspired to harm Moore either by beating

him up at Zullo's house (battery) or by taking Moore to Teer's house where he could be beaten without witnesses (kidnapping and battery). The prosecution relied on this alternative theory of liability to argue that Appellants could be found guilty of the charged crimes because they were a natural and probable consequence of the object of the uncharged conspiracy. As the Supreme Court made clear in *Hajek and Vo*, where an uncharged conspiracy is used as one theory of liability for a charged offense, a trial court "may discharge its obligations by instructing on the elements of conspiracy and the prosecution's burden to prove the defendant's guilt of [the charged offense] beyond a reasonable doubt." (*Hajek and Vo*, *supra*, 58 Cal.4th at p. 1203.) The trial court met those obligations here.

II. Alleged Evidentiary Error

Appellants join in arguing that the trial court erred in admitting evidence of efforts to intimidate Moore and influence his testimony at trial. Pryor also asserts that the court erred in excluding evidence of his educational and vocational background. Appellants contend these evidentiary errors violated their federal constitutional right to a fair trial and due process.

A. Relevant Law

The rules pertaining to the admissibility of evidence are well-established. "Only relevant evidence is admissible at trial. [Citation.] Under Evidence Code section 210, relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' A trial court has 'considerable discretion' in determining the relevance of evidence. [Citation.] Similarly, the court has broad discretion under Evidence Code section 352 to

exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) "'A trial court's decision to admit or exclude evidence is a matter committed to its discretion '"and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]' [Citations.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1056.)

B. The Trial Court Did Not Err in Admitting Evidence of Witness Intimidation

Pryor asserts the trial court erred in admitting evidence of efforts made by Teer and others to intimidate Moore prior to his testimony. Teer joins in this argument. We conclude that Appellants forfeited their claims as to most of the witness intimidation evidence challenged on appeal by failing to object in the trial court, and that even if the claims were not forfeited, the evidence was properly admitted as relevant to Moore's credibility.

On direct examination, Moore testified that, when he came to court to testify at the preliminary hearing, he saw a friend, Jonathan Clutter, in the courtroom wearing a shirt that communicated "stop snitching." Moore believed Clutter and Teer were acquaintances. He also believed Clutter wore the shirt to threaten him. Moore further testified that, after the preliminary hearing, he had conversations with two people associated with Teer. While in jail on a domestic violence offense, Moore was approached by Bob Manning, a high-ranking member of the Palmdale Peckerwood gang, during the booking process. Manning said he was "like a street dad" to Teer, and asked Moore for his name and if he had "something to do with this case."

Moore also had a conversation with Lurana Schmerber, Teer's girlfriend. She told Moore that a fourth person, White, was involved in the beating. Moore had testified at the preliminary hearing that Teer hit him with the crow bar during the assault. The conversation with Schmerber, however, made Moore question whether White may have been the one with the crow bar instead.

Moore also recounted that, prior to testifying at trial, he was twice transported from jail to the courthouse on the same bus as Appellants. Although there was a barrier between Moore and Appellants, they engaged him in conversation, and Teer told Moore his version of events. After these conversations, Moore decided to testify that White (and not Teer) had hit him with the crow bar, and he let the prosecutor know that he was planning to change his testimony. However, when the prosecutor advised Moore "not to testify to something you heard somebody else say or guess," Moore decided not to identify White as the person with the crow bar. Instead, Moore testified at trial that he did not see who hit him with the crow bar, and that he did not see White at any time during the attack.

Appellants argue that the trial court erred in allowing Moore to testify about these efforts to intimidate him and influence his testimony because there was no evidence that Appellants authorized or acquiesced in these efforts. The record reflects, however, that Pryor's counsel did not raise any objection to this evidence at trial, and that Teer's counsel only objected on relevance grounds to the testimony about Clutter's presence at the preliminary hearing in a "stop snitching" shirt.[4] To preserve

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[4] Teer's counsel also objected on grounds of speculation to a question posed to Moore about why he believed "someone might

an evidentiary issue for appeal, the objecting party must make a timely objection stating the specific ground on which it is made. (Evid. Code § 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620.) "'Although no "particular form of objection' is required, the objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." [Citation.]' [Citation.]" (*Valdez*, *supra*, 55 Cal.4th at p. 130.) In the absence of a specific, timely objection in the trial court, """questions relating to the admissibility of evidence will not be reviewed on appeal."""" (*People v. Williams*, *supra*, at p. 620.) Because Appellants did not raise any objection to the evidence about the efforts made by Manning, Schmerber, and Appellants to intimidate Moore or to influence his testimony, they have forfeited those claims on appeal.

Even if each of the evidentiary claims had been preserved for appeal, they would fail on the merits. The Evidence Code provides that the "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] … [¶] (f) The existence or nonexistence of a bias, interest, or other

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want to get their hands" on him in jail. Moore had testified that he believed he was being held in isolation to ensure that "nobody can get their hands on me." Teer's counsel did not, however, object to Moore's testimony about his conversation with Manning while being booked in jail, or his conversations with Appellants while on the bus from the jail to the courthouse.

motive. [¶] … [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony." (Evid. Code, § 780.) Accordingly, "'[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court.' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 429-430.) It is true, as Appellants assert, that evidence of efforts to intimidate a witness is also admissible to show a defendant's consciousness of guilt if there is evidence that the defendant authorized or acquiesced in the efforts. (*Valdez*, *supra*, 55 Cal.4th at p. 135, fn. 32.) However, when offered on the issue of a witness's credibility, "'there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is "directly linked" to the defendant. [Citation.]' [Citation.]" (*Ibid.*, fn. omitted.) Indeed, "'evidence of a "third party" threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant. [Citations.]' [Citation.] 'It is not necessarily the source of the threat—but its existence—that is relevant to the witness's credibility.'" (*People v. Sandoval*, *supra*, at p. 430.)

Here, the evidence of efforts to intimidate Moore and to influence his testimony were clearly relevant to his credibility as a witness. Moore testified that he felt threatened when he saw Clutter wearing a "stop snitching" shirt at the preliminary hearing, and that this incident contributed to the "fear and worry" he was experiencing in having to testify in this case. Moore likewise testified that his encounter with Manning while in county jail left him feeling "nervous." In addition, Moore

testified that his conversations with Schmerber and Teer caused him to doubt his prior testimony that Teer was the person who hit him with the crow bar during the attack. As a result, Moore testified at trial that he did not see who had the crow bar. Evidence of these conversations was thus relevant to explaining the discrepancy between Moore's preliminary hearing testimony and his trial testimony. Such evidence also was relevant to supporting Moore's credibility as a key witness for the prosecution about the identity of the assailants and their actions during the attack. (*People v. Merriman*, *supra*, 60 Cal.4th at p. 86 ["'witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony'"]; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 ["trial court has discretion . . . to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness"]). Because the evidence was not offered to prove Appellants' consciousness of guilt, proof of a direct link between Appellants and the efforts to intimidate Moore was not required.

We likewise reject Appellants' claim that the admission of the evidence violated their constitutional right to due process and to a fair trial. It has long been recognized that "'[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a defendant's constitutional rights." (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) "To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial." (*People v. Albarran* (2007)

149 Cal.App.4th 214, 229.) Here, the trial court had broad discretion to allow evidence of the efforts to intimidate Moore and to influence his testimony because it was directly relevant to his credibility. Appellants have failed to show an abuse of discretion or violation of due process in the admission of such evidence.

C. The Trial Court Did Not Err in Excluding Evidence of Pryor's Education and Trade

Pryor also contends the trial court erred in excluding evidence of his educational and vocational background. The record reflects that, at the start of Pryor's direct examination, his counsel asked him what was the highest level of education he had achieved and whether he had a trade. The trial court sustained the prosecution's objections to both questions on relevance grounds. The court later admonished Pryor's counsel for his "ongoing pattern of violations of various 402 motions," and noted that counsel's first two questions to his client were "in direct violation" of its prior ruling that Pryor's education and vocation were irrelevant.[5] Pryor's counsel advised the court that any violation was inadvertent, and apologized.

Pryor argues the evidence of his education and vocation should have been admitted to counter the prosecution's claim that he was a member of a skinhead gang. Pryor also asserts

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[5] The prior ruling was made after Pryor's counsel told the jury during his opening statement that Pryor had graduated from high school and learned two trades–plumbing and construction–that "put him in good standing for earning money lawfully and helping out his community." Following the opening statement, the prosecution moved to exclude any evidence of Pryor's education and vocation as irrelevant, and the trial court granted the motion.

such evidence was relevant to showing "his efforts to legitimately support himself financially." This argument lacks merit. The prosecution never claimed that Pryor participated in the assault or robberies because he lacked the means to provide for himself financially. The prosecution's theory of the case was that Pryor committed these crimes as retribution for Moore's acts of disrespect toward his fellow skinheads. Evidence that Pryor graduated from high school or learned a trade was not probative of whether he was a member of a gang when he committed the charged offenses. Pryor also cannot show any prejudice in the exclusion of the proffered evidence. The prosecution presented ample evidence establishing Pryor's gang membership and participation in the attack on Moore. Pryor also testified that he was in the drug dealing business and went to Zullo's house on the day of the assault to introduce Teer to one of his customers. On this record, it is not reasonably probable that evidence that Pryor graduated from high school or had a job outside of drug dealing would have resulted in a more favorable verdict.

III. Sufficiency of the Evidence on Gang Enhancements

Appellants join in challenging the sufficiency of the evidence supporting the jury's gang enhancement findings. They specifically contend the evidence was insufficient to show the existence of a "criminal street gang" within the meaning of section 186.22, subdivision (f). They also claim the evidence was insufficient to prove that they committed the charged offenses "with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b).

A. Overview of Governing Law

The Legislature enacted the California Street Terrorism Enforcement and Prevention Act expressly "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [§ 186.22, subd. (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

In assessing a claim of insufficient evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine

the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same test applies to the review of a gang enhancement finding. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

B. Substantial Evidence Supported the Finding on the Existence of a Criminal Street Gang

Appellants argue the prosecution failed to present sufficient evidence to establish that the American Front Skins, Answer Skins, or AV Skins was a "criminal street gang" within the meaning of section 186.22, subdivision (f). In particular, Appellants assert that the prosecution did not offer any evidence to show that either the American Front Skins or Answer Skins were an ongoing organization or association with a common name or common identifying sign or symbol, or that either alleged gang engaged in a pattern of criminal activity or committed any of the statutorily enumerated offenses as one of its primary activities. Appellants further contend that the prosecution failed to prove that the AV Skins were a criminal street gang because the gang expert did not sufficiently describe the primary activities of the AV Skins and relied on inadmissible hearsay in discussing the gang's alleged pattern of criminal activity.

In response, the Attorney General asserts that the prosecution met its burden of showing the existence of a criminal street gang by presenting evidence that the American Front

Skins, Answer Skins, and AV Skins were connected to one another and were part of the larger skinhead organization in the Antelope Valley area. The Attorney General also argues that the testimony of the gang expert was not based on inadmissible hearsay, and was sufficient to prove the gang's primary activities and pattern of criminal activity.

1. Ongoing Organization, Association, or Group of Three or More Persons

To establish that a gang is a "criminal street gang" within the meaning of the gang enhancement statute, the prosecution must prove, among other elements, that the gang is an "ongoing organization, association, or group of three or more persons, whether formal or informal, . . . having a common name or common identifying sign or symbol. . . ." (§ 186.22, subd. (f).) In this case, the prosecution proceeded on the theory that the AV Skins, Answer Skins, and American Front Skins (as well as the other skinhead gangs identified by its gang expert) were all part of a larger skinhead organization in the Antelope Valley, and that Appellants committed the charged offenses for the benefit of this organization and with the specific intent to promote criminal conduct by its members. In addition to offering gang expert testimony on the associational connection between the various Antelope Valley skinhead gangs, the prosecution presented evidence that the AV Skins, the largest of these groups, engaged in a pattern of criminal activity and committed certain statutorily enumerated offenses as one of its primary activities.

In *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), the California Supreme Court held that "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22(f) turns on the existence and conduct

of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Id*. at p. 71.) As the Supreme Court explained: "That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. [¶] Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22(f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22(b)." (*Id*. at pp. 71-72, fns. omitted.)

In *Prunty*, the prosecution's theory was that the defendant committed an assault to benefit the Sacramento-area Norteño gang. (*Prunty*, *supra*, 62 Cal.4th at p. 66.) The evidence showed that the defendant identified as a Norteño, claimed membership in a Norteño subset known as the Detroit Boulevard Norteños, and invoked the term "Norte" when assaulting a perceived rival gang member. (*Ibid*.) To prove the defendant's crime was subject to a gang enhancement, the prosecution's gang expert testified about the Sacramento-area Norteño gang's general existence and origins, its use of shared signs, symbols, colors, and names, and its primary activities. (*Ibid*.) The expert also testified about predicate crimes committed by two other Norteño subsets (of

which the defendant was not a member), but did not offer any specific testimony connecting these subsets to one another or to the Sacramento-area Norteño gang in general. (*Ibid*.)

The Supreme Court in *Prunty* concluded that the evidence was insufficient to support the gang enhancement because the prosecution failed to show an associational or organizational connection between the two Norteño subsets that committed the predicate offenses and the larger Norteño gang that the defendant allegedly sought to benefit by committing the assault. (*Prunty*, *supra*, 62 Cal.4th at p. 81.) In discussing "where the prosecution's evidence fell short," the Court stated: "Although [the expert] characterized these [subset] groups as Norteños, he otherwise provided no evidence that could connect these groups to one another, or to an overarching Sacramento-area Norteño criminal street gang. [The expert] did not describe any evidence tending to show collaboration, association, direct contact, or any other sort of relationship among any of the subsets he described. None of his testimony indicated that any of the alleged subsets had shared information, defended the same turf, had members commonly present in the same vicinity, or otherwise behaved in a manner that permitted the inference of an associational or organizational connection among the subsets. . . . [¶] Nor did [the expert's] testimony demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association that the defendant sought to benefit. Although there was ample evidence that [the defendant] self-identified as both a member of the Detroit Boulevard Norteños and the larger umbrella Norteño gang, and that he collaborated with a member of another subset to commit his present offenses, the prosecution presented no evidence that

the members of [the two subsets that committed the predicate offenses] self-identified as part of the umbrella Norteño gang." (*Id*. at pp. 82-83.) In the absence of any such evidence, the jury was "left with no way to connect the subsets that committed the predicate offenses to the larger Norteño group the prosecution claimed [the defendant] acted to benefit." (*Id*. at p. 83.)

In concluding that the prosecution failed to meet its burden of proving the existence of a criminal street gang, the *Prunty* court offered some examples of the type of evidence that could demonstrate an organizational or association connection between subsets of a gang. (*Prunty*, *supra*, 62 Cal.4th at p. 81.) The Court explained: "In [some] situations, a formal structure or hierarchy may not be present, but the facts may suggest the existence of behavior reflecting such a degree of collaboration, unity of purpose, and shared activity to support a fact finder's reasonable conclusion that a single organization, association, or group is present. One possibility in such situations is for prosecutors to show that members of the various subsets collaborate to accomplish shared goals. For instance, the evidence may show that members of different subsets have 'work[ed] in concert to commit a crime' [citation] or that members have strategized, formally or informally, to carry out their activities. Ultimately, this type of evidence will permit the inference that the subsets have some sort of informal relationship. This evidence need not be direct, and it need not show frequent communication or a hierarchical relationship among the members who communicate. . . . [E]vidence that two . . . subsets have professed or exhibited loyalty to one another would be sufficient to show that the two subsets collaborate or cooperate. [Citation.] So too would evidence of fluid or shared

membership among the subset or affiliate gangs, or evidence that a 'liaison' works to coordinate relations between the groups. [Citation.] [¶] Even evidence of more informal associations, such as proof that members of two gang subsets 'hang out together' and 'back up each other,' can help demonstrate that the subsets' members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture. . . In general, evidence that shows subset members have communicated, worked together, or share a relationship (however formal or informal) will permit the jury to infer that the subsets should be treated as a single street gang." (*Id*. at pp. 78-79, fn. omitted.)

In this case, we conclude that the prosecution presented sufficient evidence to establish the existence of a criminal street gang by showing an associational or organizational connection that united the AV Skins (the gang that committed the predicate offenses and primary activities) with the other skinhead gangs that operated in the Antelope Valley area. First, the prosecution offered evidence that the various Antelope Valley skinhead gangs –AV Skins, Answer Skins, American Front Skins, Metal Mindz, Dead Line Family Skins, and Palmdale Peckerwoods–shared a common ideology, a common territory, and common identifying signs and symbols. While the *Prunty* court made clear that a criminal street gang "must be united by more than shared colors, names, and other symbols," such commonality is still necessary to satisfy the elements of section 186.22, subdivision (f). (*Prunty*, *supra*, 62 Cal.4th at p. 74.) In support of this requirement, Officer Welle, the prosecution's gang expert, testified that the various local skinhead gangs had a common ideology and overarching goal of white supremacy. These gangs also

associated with the color red to signify their purported Aryan bloodline, and identified with the numbers "88" and "14" to reflect their adherence to two white supremacist writings known as the "88 Precepts" and "14 Words." While the AV Skins, the largest of these skinhead gangs, claimed the Antelope Valley as its territory, the other smaller gangs were permitted to operate in the same geographic area. Officer Welle explained that the smaller skinhead gangs "typically operate with the AV Skins . . . because they don't have the same numbers as some of the other local gangs." As a result, all of these groups "tend to join together to increase their . . . power base." (*Prunty*, *supra*, 62 Cal.4th at p. 77 ["evidence that two seemingly unrelated . . . cliques routinely act to protect the same territory or 'turf' could suggest that they are part of a larger association"].)

Second, the prosecution presented evidence of an informal relationship among the various Antelope Valley skinhead gangs, including fluid membership. (*Prunty*, *supra*, 62 Cal.4th at p. 78 [associational connection between gang subsets can be shown by "evidence of fluid or shared membership among the subset or affiliate gangs" or "proof that members of two gang subsets 'hang out together' and 'back up each other'"].) For instance, there was evidence that a person could belong to multiple skinhead gangs. Officer Welle opined that Teer was a member of both the AV Skins and Answer Skins, and that Pryor was a member of both the AV Skins and American Front Skins. Moore testified that he knew Teer to be a member of the Answer Skins as well as a former member of the AV Skins, and knew Pryor to be a member of different skinhead gangs, including the American Front, Satanic Skins, and Answer Skins. While Moore identified Jenkins as an AV Skins member, White testified that Jenkins belonged to

Metal Mindz. There was also evidence that members of these affiliated groups offered assistance to one another and displayed a level of mutual respect despite belonging to different gangs. In particular, the evidence showed that when Teer "put the word out to people" that he was looking for Moore, Pryor and Jenkins made efforts to try to locate Moore so that Teer could confront him. In addition, White testified that skinheads called each other "comrade," and that Teer and Pryor referred to one another in this way. White also testified that Jenkins said he had to help Teer and Pryor in confronting Moore because "they were his comrades." Pryor likewise made reference to aiding a fellow skinhead in describing his part in the attack, telling the police that he merely "went and played the role with [a comrade]."

Third, the prosecution offered evidence that the various Antelope Valley skinhead gangs collaborated and cooperated to accomplish shared goals. (*Prunty*, *supra*, 62 Cal.4th at p. 78 [collaboration among gang subsets can be shown through evidence that "members of different subsets have 'work[ed] in concert to commit a crime'" or "have strategized, formally or informally, to carry out their activities"].) While Officer Welle described the different skinhead gangs as "their own individual gangs that operate under [a common] ideology," he testified that most of the crimes committed by the smaller gangs are done "in concert" with the AV Skins. He also testified that these gangs strategize with one another on "both a formal and informal basis" in carrying out their criminal activities, and that "it's easy for them to work together" because of their shared ideology. In addition, Officer Welle testified that the gangs "exhibit loyalty" to each other, "do what they can to not operate against one another," and "try and work together" to achieve their common

goals. The attack on Moore provided further evidence of cooperation among members of the different skinhead gangs. The prosecution presented evidence that at least three individuals affiliated with the AV Skins, Answer Skins, and/or American Front Skins met, planned, and executed the assault on Moore because he had disrespected two of them. When Moore begged the men to stop, one of them said, "Don't ever try and identify yourself with us. . . ." At the end of the assault, Moore also was warned never to "claim skin heads again." Based on the totality of this evidence, the jury reasonably could have inferred that the various Antelope Valley skinhead gangs, including the AV Skins, were part of a single "ongoing organization, association or group" within the meaning of section 186.22, subdivision (f).

2. Pattern of Criminal Activity

To prove the existence of a "criminal street gang" within the meaning of the gang enhancement statute, the prosecution also must establish that the gang's members "individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" means "the commission of, attempted commission of, conspiracy to commit, . . . or conviction of two or more of the [enumerated] offenses, provided . . . the offenses were committed on separate occasions, or by two or more persons" within a statutorily defined time period. (§ 186.22, subd. (e).) Appellants contend that the prosecution failed to prove this element because its expert's testimony about the predicate offenses was based on inadmissible hearsay, citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The Attorney General counters that the expert's testimony was permissible under *Sanchez* because the expert merely told the jury in general terms that he relied on hearsay in

forming his opinion, and he did not reveal any case-specific facts in testifying about the requisite predicate offenses.

In *Sanchez*, the California Supreme Court considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) limits an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and addressed the proper application of California hearsay law to the scope of expert testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) The *Sanchez* court held that the case-specific out-of-court statements related by the prosecution's gang expert constituted inadmissible hearsay under California law; where those statements were testimonial in nature, they also should have been excluded under *Crawford*. (*Id.* at pp. 670-671.)[6]

With respect to California hearsay law, the *Sanchez* court drew a distinction between "an expert's testimony regarding his general knowledge in his field of expertise," and "case-specific facts about which the expert has no independent knowledge." (*Sanchez*, *supra*, 63 Cal.4th at p. 676, italics omitted.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) Traditionally, "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Ibid.*) Thus, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude

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6 Appellants are not contending on appeal that the admission of the gang expert's testimony on predicate offenses violated *Crawford* or their Sixth Amendment confrontation rights. Instead, their claim on appeal asserts only an alleged violation of California hearsay law.

given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.) On the other hand, "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.) "If an expert testifies to case-specific out-of-court statements to explain the bases for his [or her] opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684.)

Since *Sanchez*, there has been a split of authority among appellate courts as to whether a gang expert's testimony about predicate offenses entails "case-specific facts" as defined in *Sanchez*. Some courts have concluded that evidence of predicate offenses not committed by the defendant should be classified as "general background information," and thus treated as a subject matter about which a qualified gang expert may relate hearsay. (See *People v. Blessett* (2018) 22 Cal.App.5th 903, 943-945; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, review granted Mar. 22, 2017, S239442, opn. ordered to remain precedential.) Other courts have concluded that facts pertaining to predicate offenses are necessarily case specific, and therefore subject to the requirement

that the expert not relate hearsay statements in testifying about those facts. (See *People v. Lara* (2017) 9 Cal.App.5th 296, 337; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 583, 588-589.) In this case, with one exception, Officer Welle did not relate any out-of-court statements in testifying about the predicate offenses, and any error in admitting hearsay evidence on this subject matter was harmless.

To prove the "pattern of criminal activity" element of the gang enhancement statute, the prosecution offered evidence of a predicate offense committed by Robert Michael Ball in February 2012 and a predicate offense committed by Justin Sumnicht in April 2012. The evidence consisted of Officer Welle's testimony about the gang membership and criminal convictions of Ball and Sumnicht, along with certified copies of court records regarding those convictions. Officer Welle specifically testified that both Ball and Sumnicht were members of the AV Skins. When asked how he knew Ball, Officer Welle stated: "Through the course of my investigation into this crime I believe it was the victim who identified him as a skin head, as well as his known reputation as a local skin head and through other deputies who have other contacts with him."[7] When asked how he was familiar with Sumnicht's offense, Officer Welle answered: "This was a case that one of my partners, Detective Richard O'Neal, investigated. He is also an [Operation Safe Streets] investigator." Officer Welle provided no further testimony about the alleged gang membership of either Ball or Sumnicht.

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[7] Officer Welle clarified that he referred to his "investigation into this crime," he meant the crime committed by Ball.

Appellants argue that Officer Welle's testimony was based on inadmissible hearsay because it conveyed case-specific, out-of-court statements about Ball's and Sumnicht's gang membership. With respect to Ball, Officer Welle identified three sources of information for his opinion that Ball was an AV Skin gang member: (1) the victim in Ball's criminal case identified him as a skinhead; (2) Ball's known reputation as a local skinhead; and (3) other deputies who had contacts with Ball. With respect to Sumnicht, Officer Welle offered only one source of information for his opinion that Sumnicht was an AV Skin gang member: the investigation conducted by his partner, Detective O'Neal, into Sumnicht's predicate crime. In rendering his opinion about these individuals' gang membership, the only out-of-court statement that Officer Welle arguably related to the jury was the alleged victim's identification of Ball as a skinhead. In describing the other sources of information for his opinion on Ball's gang membership (Ball's reputation as a local skinhead and other deputies' contacts with him), Officer Welle did not convey any specific out-of-court statements made by the deputies or anyone else. Likewise, in identifying his sole source of information for his opinion on Sumnicht's gang membership (Detective O'Neal's investigation), Officer Welle did not relate any out-of-court statements made by Detective O'Neal or any other person involved in that investigation.

In *Sanchez*, the Supreme Court explained that, while "an expert cannot . . . relate as true case-specific facts asserted in hearsay statements," the expert "may still rely on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685, 686.) The expert also may tell the jury "generally the kind and source of the

'matter' upon which his opinion rests so that the jury can "independently evaluate the probative value of an expert's testimony." (*Id*. at 686.) Officer Welle thus was not precluded from testifying in general terms that he relied on other officers as well as his own knowledge about a person's gang reputation as a basis for his opinion that the two individuals who committed the predicate offenses were AV Skin gang members.

With respect to Officer Welle's statement about the alleged victim's identification of Ball as a skinhead, we conclude that any error in admitting that testimony was harmless. The erroneous admission of nontestimonial hearsay is a violation of state statutory law subject to the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685, 698.) Under this standard, reversal is required only if it is reasonably probable that the defendant would have achieved a more favorable result if not for the error. (*People v. Wall* (2017) 3 Cal.5th 1048, 1060.) As discussed, Officer Welle testified about two other sources of information for his opinion on Ball's gang membership, neither of which violated *Sanchez*. Additionally, Officer Welle did not provide any details about his investigation of Ball's predicate crime or the alleged victim, nor did he testify that the victim had identified Ball as a member of the AV Skins. Rather, Officer Welle merely stated that, during his investigation, he believed Ball was identified by the victim as a skinhead. Under these circumstances, it is not reasonably probable that the jury would have found that Ball's crime did not qualify as a predicate offense had Officer Welle's statement about the victim's identification been excluded. The gang expert testimony was sufficient to establish the predicate offenses element of the gang enhancement statute.

3. Primary Activities of the Gang

To prove that a gang is a "criminal street gang," the prosecution also must show that the gang has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e). (§ 186.22, subds. (e), (f).) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id.* at p. 324.) "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

At trial, the prosecution offered Officer Welle's testimony about the AV Skins gang to prove the primary activities element of the gang enhancement statute. Officer Welle testified that he was familiar with the AV Skins, had spoken to many of its members during the course of his work, and had investigated crimes committed by the gang. When asked by the prosecutor "[w]hat kinds of crimes are typically committed by the [AV Skins]," Officer Welle testified: "Narcotics possession, weapons possession, assaults such as robberies, felony assaults, where somebody gets beat down. Burglaries. Things of that nature."

The prosecutor then asked, "What would you say are the primary activities of the Antelope Valley Skins?" In response, Officer Welle stated: "The primary crimes that the Antelope Valley Skin Heads commit would be burglary, auto theft, the sales of narcotics and felony assaults." Officer Welle also answered in the affirmative when asked whether the AV Skins and "any subsets or clicks that operate with them . . . individually and collectively engage in this pattern of criminal activity."

Appellants assert the prosecution failed to elicit evidence that one of the AV Skin's primary activities was the commission of an enumerated offense because Officer Welle merely alluded to crimes "typically committed" by the AV Skins, but did not demonstrate that its members commit those crimes as a primary activity of the gang. We disagree. In making this argument, Appellants are focusing on an isolated and incomplete portion of Officer Welle's testimony. It is true that the prosecutor initially asked Officer Welle "what kinds of crimes are typically committed by" the AV Skins. However, the prosecutor then followed up by specifically asking about the primary activities of the AV Skins. In response to that question, Officer Welle identified burglary, auto theft, narcotics sales, and felony assaults as the gang's "primary crimes." As this Court observed in *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107, "[o]rdinary human communication often is flowing and contextual. Jurors know this. Repetitive and stilted responses make up one kind of direct examination, but not the only kind." When Officer Welle's testimony is considered as a whole, it is sufficient to establish that one or more of the crimes enumerated in section 186.22, subdivision (e) were among the AV Skins' primary, principal, main, or chief activities.

C. Substantial Evidence Supported the Finding on the Specific Intent to Promote, Further, or Assist in Criminal Conduct by Gang Members

Appellants further argue that the gang enhancement findings must be reversed because the evidence was insufficient to support a finding that either of them committed the charged offenses with the specific intent to promote, further, or assist in criminal conduct by gang members. Rather, Appellants assert, the evidence demonstrated that the impetus behind the charged offenses was solely to seek retribution against Moore for his role in committing an act of vandalism against Teer.

To obtain a true finding on a gang enhancement allegation, the prosecution also must prove that the charged offense was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) The enhancement thus applies "when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar*, supra, 51 Cal.4th at p. 68.) To establish these elements of the statute, "the prosecution may . . . present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) "'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]'" (*People v. Ward* (2005) 36 Cal.4th 186, 209.) While a gang expert may not ordinarily testify whether the defendant committed a particular crime for the benefit of a gang or with the specific intent to facilitate criminal conduct by gang members, the expert "properly could . . . express

an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In this case, we conclude there was substantial evidence connecting the charged offenses to the AV Skins and the other Antelope Valley skinhead gangs. The jury heard evidence that Teer was a member of the AV Skins and Answer Skins, and that Pryor was a member of the AV Skins and American Front Skins. Both men had a number of gang tattoos demonstrating their affiliation with the skinhead movement. The victim, Moore, also was a member of the AV Skins, as was the third individual who participated in the crimes, Jenkins. While the fourth participant, White, was not a member of any gang, he had close ties to other skinhead gang members. The jury also heard evidence that Teer was a shot caller, or high-ranking gang member, and that Teer "put the word to people" that he was looking for Moore after the tire-slashing incident. In response, both Pryor and Jenkins made active efforts to locate Moore, with Jenkins calling various people to ascertain Moore's whereabouts and Pryor engaging in a high-speed chase of Moore when Moore tried to avoid meeting Teer. The jury heard further evidence that Pryor and Jenkins felt compelled to help Teer confront Moore because Teer was their "comrade," a term that skinheads called one another. Notably, during the attack on Moore, one of the men warned him "to keep the word skin head out of [his] mouth," which Moore understood to mean that he was "not to claim skin head" again.

In addition to this evidence, the jury heard Officer Welle's expert testimony that, based on a hypothetical drawn from the evidence in this case, the attack on Moore would have been

committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. Officer Welle testified that an act of disrespect against a fellow skinhead gang member would compel the gang to "regulate," or discipline, the perceived offender to keep its members in line. Officer Welle also testified that a gang's act of disciplining a member through a violent assault would instill fear in the community, which would deter residents from reporting gang-related crimes. Such acts of violence also would serve to enhance the gang's reputation, and enable it to conduct its criminal activities with impunity. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 63 ["[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang'"]; *People v. Gardeley* (1996) 14 Cal.4th 605, 619, disapproved on other grounds by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13 [based on expert testimony that a gang relied on violent assaults to frighten residents, "the jury could reasonably conclude that the attack on [the victim] . . . was committed 'for the benefit of, at the direction of, or in association with' that gang"].)

Given that Appellants committed the charged offenses in concert with an AV Skin gang member, and against another current or former AV Skin gang member who had disrespected them, the jury reasonably could have inferred that the motive for the offenses was gang-related. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68 ["if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the

defendant had the specific intent to promote, further, or assist criminal conduct by those gang members"]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["[c]ommission of a crime in concert with known gang members . . . supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"].) On this record, the jury's true findings on the gang enhancements as to each appellant were supported by substantial evidence.[8]

IV. Sufficiency of the Evidence on Robbery Convictions

Appellants also challenge the sufficiency of the evidence supporting their convictions for the robbery of Carter (count 1) and the robbery of Moore (count 4), and the acting-in-concert findings made as to each of those counts. As to the robbery of Carter, Appellants contend the evidence was insufficient to support a finding that they either directly perpetrated, or aided and abetted, the taking of Carter's property. As to the robbery of Moore, Appellants assert the evidence failed to establish that any property belonging to Moore was taken. They also argue there was insufficient evidence to support a finding that they either directly perpetrated, or aided and abetted, the robbery of Moore, or that the robbery of Moore was a natural and probable consequence of a conspiracy to commit a battery or kidnapping.[9]

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[8] We accordingly affirm the true findings on the gang enhancements as to counts 4, 5, and 6. However, for the reasons set forth in section IV, we reverse the true finding on the gang enhancement as to count 1 because each appellant's underlying conviction in count 1 is reversed for lack of sufficient evidence.

[9] The jury was not instructed on the natural and probable consequences doctrine as a theory of aiding and abetting liability

A. Relevant Law

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Our Supreme Court has described the crime of robbery as "larceny with the aggravating circumstances that 'the property is taken from the person or presence of another …' and 'is accomplished by the use of force or by putting the victim in fear of injury.' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) "Robbery may be accomplished when fear prevents a victim from retaining possession of property within [his] or her reach that [he or] she could have retained absent the robber's intercession. [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 240.) "'[T]he crime of robbery is a continuing offense that begins from the time of the original taking [and does not end] until the robber reaches a place of relative safety.' [Citation.]" (*People v. Anderson*, *supra*, at p. 994.) "If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken. [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.)

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for any of the charged offenses. The jury was instructed on the natural and probable consequences doctrine as a theory of conspiracy liability for robbery; however, as instructed by the trial court, this theory of liability only applied to the robbery of Moore (count 4), and not to the robbery of Carter (count 1). Thus, based on the instructions given by the trial court, Appellants could be found guilty of the robbery of Moore under the theory that robbery was a natural and probable consequence of an uncharged conspiracy to commit a battery or kidnapping. Appellants could not, however, be found guilty of the robbery of Carter under this theory of vicarious liability.

"[E]very robbery which is perpetrated in an inhabited dwelling house . . . is robbery of the first degree." (§ 212.5, subd. (a).) Section 213 establishes an enhanced sentencing range for home invasion robbery committed in concert with two or more other persons. It provides that "[r]obbery of the first degree is punishable as follows: [¶] (A) If the defendant, voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house, . . . by imprisonment in the state prison for three, six, or nine years. [¶] (B) In all cases other than that specified in subparagraph (A), by imprisonment in the state prison for three, four, or six years." (§ 213, subd. (a)(1).)

"Penal Code section 31, which governs aider and abettor liability, provides in relevant part, '[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.' An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 161, fn. omitted.) Accordingly, "'[a] person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citation.]" (*People v. Delgado* (2013) 56 Cal.4th 480, 486, fn. omitted.) Although mere presence at the scene of the crime is not sufficient to constitute aiding and abetting, it is a circumstance that may be considered in assessing criminal liability. (*People v.*

Garcia (2008) 168 Cal.App.4th 261, 272-273.) Other factors to be considered by the trier of fact include "'failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.'" (*Id.* at p. 273.)

One who conspires with others to commit a crime also is guilty as a principal. (*In re Hardy* (2007) 41 Cal.4th 977, 1025.) In addition, "'"[e]ach member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.'" [Citations.]" (*Id.* at pp. 1025-1026.) Therefore, "a conspirator may be vicariously liable for a crime committed in furtherance of a conspiracy . . . if that crime was a natural and probable consequence of the conspiracy." (*People v. Prieto* (2003) 30 Cal.4th 226, 249-250; see also *People v. Guillen* (2014) 227 Cal.App.4th 934, 998 ["'each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design'"].) '"'[A] natural and probable consequence is a foreseeable consequence". . . .' [Citation.] . . . '[T]o be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . ." [Citation.]' [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case. . . . [Citations.]" (*People v. Medina* (2009) 46 Cal.4th 913, 902.)

B. Count 1 – The Evidence Was Insufficient To Support the Convictions and Acting-in-Concert Findings for the Robbery of Carter

Appellants contend the robbery convictions and acting-in-concert findings in count 1 must be reversed because the evidence was insufficient to establish that they were either a direct perpetrator of the robbery of Carter, or an aider and abettor in that crime. We agree the evidence failed to support a finding that either appellant directly perpetrated the robbery of Carter because none of the witnesses testified that they saw Pryor or Teer take any property, or observed them carrying away any property as they were leaving the scene of their assault on Moore. We further agree the evidence failed to support a finding that either appellant aided and abetted the robbery of Carter because none of the evidence showed that Pryor or Teer intended to take Carter's property during the assault on Moore, or had any knowledge of their co-assailant's intent to take such property.

At trial, the prosecution presented evidence that Pryor, Teer, Jenkins, and White went to Zullo's house with the intent to either beat up Moore at that location, or to kidnap Moore and take him to Teer's house for a beating. Once in the garage, Pryor, Teer, and Jenkins violently assaulted Moore, while Carter and Langosh complied with the order to stay seated on the couch with their heads covered. At the end of the attack, the group left the garage together, and Jenkins handed White a bag of cell phones. After the men left, Carter saw that his tote bag had been moved, and that his wallet, which had been inside the bag, and his cell phone, which had been on the table next to the bag, were missing.

From this evidence, the jury reasonably could have inferred that Jenkins took Carter's cell phone and wallet because he handed White a bag that contained two cell phones. The jury

also reasonably could have inferred that White aided and abetted the taking of Carter's cell phone because White transported the bag from the scene of the assault to Jenkins's house; when Jenkins opened the bag in his presence, White kept one of the cell phones for a period of time before destroying it. There was no evidence, however, from which the jury reasonably could have inferred that either Pryor or Teer was aware that Jenkins had taken Carter's property, or intended to assist Jenkins in that crime. None of the witnesses to the assault, including White, testified that they saw Carter's cell phone or wallet being taken. While White recounted that Jenkins handed him a bag as they were leaving the garage, he did not testify that Pryor or Teer saw Jenkins do so, or that any of the men made any comments about the bag, its contents, or Jenkins's conduct as they were fleeing the scene. Hence, while the evidence clearly established that Pryor and Teer were present at the scene when one of their co-assailants robbed Carter, it did not show that they had knowledge of the robbery or an intent to aid and abet its commission. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024 ["mere 'presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting'"].)

The Attorney General argues the evidence was sufficient to support each appellant's conviction in count 1 because the jury reasonably could have inferred that one of the three participants in the assault took Carter's cell phone and wallet, and that the other two participants saw this conduct and decided to facilitate the robbery by using fear to keep Carter on the couch. In support of this argument, the Attorney General notes that the garage was a small confined space without much room to maneuver, and that Carter's bag was moved to a pool table where someone rummaged

through it before taking his cell phone and wallet. It is possible, as the Attorney General asserts, that Appellants saw one of their co-assailants rummaging through Carter's bag or taking Carter's property given their presence in the garage. However, no witness testified to that fact. Indeed, White, the sole prosecution witness who was in a position to observe the robbery of Carter as it was occurring, denied seeing any property being taken. Accordingly, any inference that Appellants actually saw the taking of Carter's property would be based on speculation, not on evidence.

In a given case, "[w]e may *speculate* about any number of scenarios that may have occurred. . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; see also *People v. Moore* (2011) 51 Cal.4th 386, 406 ["That an event *could* have happened . . . does not by itself support a deduction or inference it did happen."].) Here, there was no evidence from which the jury could infer that Appellants knew of their co-assailant's intent to rob Carter, and intended to facilitate the commission of that crime. Because the evidence was insufficient to support a finding that Appellants directly perpetrated, or aided and abetted, the robbery of Carter, each appellant's conviction in count 1, and the acting-in-concert finding made as to that count, are reversed.[10]

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[10] Because the underlying conviction in count 1 is reversed, the gang enhancements (§ 186.22, subd. (b)(1)) and the firearm

C. Count 4 – The Evidence Was Sufficient To Support the Convictions and Acting-in-Concert Findings for the Robbery of Moore

In challenging the sufficiency of the evidence supporting the convictions and acting-in-concert findings in count 4 for the robbery of Moore, Appellants claim the prosecution failed to prove that any property belonging to Moore was taken. Appellants also contend the prosecution failed to present sufficient evidence to establish that they were liable for the robbery of Moore as direct perpetrators, as aiders and abettors, or as co-conspirators. We conclude there was substantial evidence to support a finding that Moore's two knives were taken from him during the assault, and that Appellants were liable for the robbery as co-conspirators under the natural and probable consequences doctrine.

Appellants first argue that the evidence failed to establish that Moore was robbed during the assault because none of the witnesses at trial testified that they saw his knives being taken. They assert that Moore's knives could have been taken by an unknown person either before or after the assault because Zullo's residence was a known "party house" with many guests. Moore testified, however, his pocketknife was on his side and his larger knife was stored in the seat cushions of the couch during the time he was at Zullo's house. Moore fell asleep on the couch the night before the assault, and woke the next morning to Pryor pointing a gun in his face. During the assault, Moore felt his wallet being yanked from his shorts, which caused his shorts to drop to his ankles. After the assault, both of Moore's knives were gone, and

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enhancement (§ 12022.53, subd. (b)) imposed as to count 1 also are reversed.

an empty sheath that had held the larger knife was found on the garage floor. Neither knife was ever recovered. Given this testimony, the jury reasonably could have inferred that Moore's knives were taken during the assault by one of his assailants.

Appellants further assert that, even if Moore was robbed during the assault, the prosecution failed to present sufficient evidence to prove that they were direct perpetrators of the robbery, or that they were liable for the robbery as aiders and abettors or as co-conspirators. We agree the evidence was insufficient to support a finding that Appellants directly perpetrated the robbery of Moore, or aided and abetted its commission. As with the robbery of Carter, there was no evidence that Appellants personally took Moore's property, had any knowledge of their co-assailant's intent to take Moore's property, or intended to assist their co-assailant in committing that crime. However, contrary to Appellants' claim, there was substantial evidence to support a finding that each of them was vicariously liable for the robbery of Moore as co-conspirators because the robbery was a natural and probable consequence of the conspiracy to commit a battery or kidnapping.

As discussed, the prosecution presented evidence that Pryor, Teer, and Jenkins conspired to take revenge on Moore either by beating him up at Zullo's house, or by taking him to Teer's house where he could be beaten without witnesses. On the morning of the attack, the three men, along with White, met at Teer's house to formulate their plan. When someone in the group raised a concern that Moore could be armed, Teer responded that he had a gun, and suggested that he might use it to shoot Moore. The group then went to attack Moore, armed with a crow bar and Teer's gun. During the assault in Zullo's garage, Teer, Pryor, and

Jenkins viciously beat Moore as he struggled to get up from the couch. One of the men warned Moore to never claim skinheads again. Shortly after the group left the garage, Moore discovered that the pocketknife that had been on his side and the larger knife that had been on the couch were missing. Based on this evidence, the jury reasonably could have inferred that, during the assault, one of the three assailants took Moore's knives in an effort to disarm him and to deprive him of his property. The jury also reasonably could have concluded that the taking of the knives was a natural and probable consequence of the group's plan to subject Moore to a beating as revenge for his acts of disrespect toward his fellow skinheads, Pryor and Teer.

Appellants contend that the evidence failed to show that the robbery occurred prior to the completion of the conspiracy to commit a battery because none of the witnesses could testify as to exactly when Moore's knives were taken. Appellants claim that, in the absence of evidence affirmatively demonstrating that the knives were taken before the assault on Moore ended, the jury could not reasonably conclude that the robbery was committed in furtherance of a conspiracy to commit a battery. It is true that "'a conspirator may be vicariously liable for a crime committed in furtherance of a conspiracy only if that crime was a natural and probable consequence of the conspiracy' [citation] and 'that acts committed by conspirators subsequent to the completion of the crime which is the primary object of a conspiracy cannot be deemed to be overt acts in furtherance of that conspiracy' [citations]." (*People v. Guillen*, *supra*, 227 Cal.App.4th at p. 999.) Here, there was substantial evidence to support an inference that Moore's property was taken from him prior to the completion of the crime that was the object of the conspiracy. Moore testified

that, near the end of the assault, Pryor pointed the gun at him and threatened to shoot. When one of the other men told Pryor that it would be too loud and they had to leave, Pryor struck Moore a final time on his head; the group then left the garage. White similarly testified that, after someone in the group said they needed to go because of the noise, Pryor delivered a final blow to Moore's head; following that blow, the men exited the garage together. Given the testimony that the last act committed by the group before leaving the garage was Pryor's act of striking Moore on the head, the jury reasonably could have inferred that the robbery of Moore occurred prior to the completion of the assault, and thus, was done in furtherance of the conspiracy.

Appellants also argue that there was insufficient evidence that robbery was a natural and probable consequence of a battery or kidnapping because the alleged conspiracy in this case focused on beating Moore, not robbing him. Appellants note that, prior to the assault, no one communicated an intent to commit a robbery. They further assert that, during the assault, they could not have been put on notice that a robbery was about to occur given that no one demanded Moore's property. It is settled law, however, that "each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design." (*People v. Zielesch* (2009) 179 Cal.App.4th 731, 739; see also *In re Hardy*, *supra*, 41 Cal.4th at pp. 1027-1028.) Moreover, "[t]he question whether an unplanned crime is a natural and probable consequence of a conspiracy to commit the intended crime 'is not whether the [co-conspirator] *actually* foresaw the additional

crime, but whether, judged objectively, [the unplanned crime] was *reasonably* foreseeable.' [Citation.]" (*People v. Zielesch*, *supra*, at p. 739.) Here, the totality of the evidence was sufficient to support a finding that the robbery of Moore was a reasonably foreseeable consequence of Appellants' plan to take revenge on Moore by beating him. Therefore, each appellant's conviction in count 4 and the acting-in-concert findings made as to that count were supported by substantial evidence.

V. Alleged Prosecutorial Misconduct

Appellants argue that the prosecutor committed prejudicial misconduct by misstating the law on the gang enhancement allegations and improperly vouching for the veracity of witnesses. The Attorney General asserts that Appellants have waived this claim by failing to object and request an admonition at trial, and that even if the claim was not waived, it lacks merit.

A. Relevant Law

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, . . . '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.] (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) Reversal for prosecutorial misconduct is not

required unless the defendant has been prejudiced thereby, that is "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

"'"To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.'" [Citation.] A court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) "'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 215.)

B. Appellants Have Forfeited Their Claim of Prosecutorial Misconduct; The Claim Also Has No Merit

As the Attorney General correctly points out, Appellants never objected to any of the prosecutor's comments about which they now complain, nor did they seek an admonition to cure any alleged harm. Accordingly, Appellants have forfeited their claim of prosecutorial misconduct on appeal. Even if the claim had not been forfeited, however, it would fail on the merits.

Appellants assert that the prosecutor committed prejudicial misconduct during closing argument by misstating the law on whether a common ideology shared by various groups can prove the existence of a criminal street gang. The record reflects that

the prosecutor told the jury as follows: "We talked about lots of different skin head groups; right? Antelope Valley Skins, Metal Mindz, American Front. Those are all different subsets, I guess, of a larger organization. But they are all tied by their common ideology. Okay? Of white supremacy. That's important for this case only because if they are separate organizations then, like with no common ideology or common background, then honestly the gang isn't proven. We haven't proved a gang. But if you find that we have proved the skin heads–no matter what gang you are from, you are all under the umbrella of one organization and ideology, that is a criminal organization. Okay? And you will see the requirements for what is a criminal street gang in the jury instructions. But it's pretty clear; right? That the skin heads are a criminal organization with a common ideology with subsets underneath that are all related. And that's what we have essentially in this case."

Although a claim of prosecutorial misconduct may be based on a misstatement of law, the record does not demonstrate that the prosecutor made any misstatement in this argument to the jury. Contrary to Appellants' characterization, the prosecutor did not tell the jury that a common ideology, standing alone, was sufficient to prove that different groups constituted a criminal street gang. Rather, the prosecutor merely emphasized that the shared ideology of white supremacy tied these various Antelope Valley skinhead gangs together. The prosecutor also made clear that the specific requirements for proving a criminal street gang were included in the jury instructions. Appellants have failed to show any misconduct in this regard.

Appellants also contend that the prosecutor committed prejudicial misconduct by improperly vouching for the credibility

of witnesses. In support of this claim, Appellants point to the prosecutor's direct examinations of Langosh, Carter, and Moore, during which the prosecutor elicited, without objection, that he had told them "to tell the truth." Appellants also point to the prosecutor's comments during closing argument that the sentence White received as part of his plea agreement was "fair." In particular, the prosecutor told the jury that White had faced a maximum sentence of 25 years to life in prison, and that his 13-year sentence was a "fair sentence" when comparing the "disabling of a security camera and hanging out" to "an active beating of a victim." Appellants argue that these comments invited the jury to convict them based on the prosecutor's representation that he had conducted himself fairly and on his personal belief that Appellants were guilty.

Appellants' claim of improper vouching is without merit. "Improper vouching occurs when the prosecutor either (1) suggests that evidence not available to the jury supports the argument, or (2) invokes his or her personal prestige or depth of experience, or the prestige or reputation of the office, in support of the argument. [Citation.]" (*People v. Anderson* (2018) 5 Cal.5th 372, 415.) "'A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.' [Citation.] 'However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his] comments cannot be characterized as improper vouching.' [Citation.]" (*People v. Romero and Self* (2015) 62 Cal.4th 1, 39.)

Here, the prosecutor did not improperly vouch for the credibility of Langosh, Carter, or Moore merely by asking them on direct examination whether he had told them to tell the truth. In asking this question, the prosecutor did not express any personal belief in the witnesses' veracity or refer to any evidence outside the record. The prosecutor's statements about White's sentence also did not constitute improper vouching. The prosecutor simply argued to the jury that White had taken responsibility for his actions and had received a fair sentence given his limited role in the crimes when compared to that of his co-perpetrators. These comments were solely based on evidence contained the record and not on any personal knowledge or belief held by the prosecutor. Finally, even assuming any error, these isolated remarks by the prosecutor did constitute a pattern of conduct so egregious that it rendered the trial fundamentally unfair, nor was it reasonably probable that Appellants would have obtained a more favorable result had the comments not been made. On this record, no prejudicial misconduct occurred.

DISPOSITION

As to each appellant, the conviction and acting-in-concert finding in count 1 and the corresponding sentence enhancements imposed as to count 1 are reversed, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J. FEUER, J.